

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 05598/16

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE

In the matter between

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

Applicant

And

THE SOUTH AFRICAN RESERVE

1ST Respondent

**THE GOVERNOR OF THE SOUTH AFRICAN
RESERVE BANK**

2nd Respondent

JUDGMENT

Matojane J

Introduction

[1] This is an appeal by the South African History Archive Trust (“SAHA”) in terms of section 78, read with section 82, of the Promotion of Access to Information Act (“PAIA”)¹ against the refusal the South African Reserve Bank (“SARB”) to provide access to records it requested .

[2] On 1 August 2014 SAHA submitted the PAIA request to the SARB requesting access to evidence obtained by the SARB as part of its investigation into any substantial contravention of, or failure to comply with the law in respect of significant fraud, gold smuggling or smuggling of other precious metals conducted during the period 1 January 1980 to 1 January 1995 into the affairs of eight named individuals² (“the PAIA request”).

[4] The requested information relates to corruption under Apartheid and the utilization of crucial institutions in public and private sectors to facilitate the externalization of South African funds during Apartheid.

[3] The SARB was unable to locate any entry in its records that relate to any investigations into allegations of significant fraud relating to the late Mr. Giovanni Ricci, the late Mr. Stephanus Botha, Mr. Paul Ekom, Mr. Craig Williamson and Dr. Wouter Basson. The SARB is unable to finish SAHA with the records referred to in the relevant request which relates to these individuals. The SARB has provided a section 23 PAIA statement in which it stated that reasonable grounds exist for believing that the relevant records do not exist as contemplated in section 23 (1) (b) (i) of PAIA. SAHA does not persist in seeking relief in relation to these five individuals.

[4] The SARB is in possession of records relating to the three remaining individuals, namely Brigadier Blaauw, Mr Robert Hill and Mr Vito Palazzolo, but refuses access to all of those records on the basis that (a) SAHA is non-suited for having failed to join Messrs Palazzolo and Hill, who were still alive to the

¹ Act No 2 of 2000

² The eight individuals are: the late Mr Giovanni Ricci, the late Mr Fanie Botha, Brig Johaan Blaaw, Mr Paul Ekom, Mr Hill, Mr Vito Palazzolo, Mr Craig Williamson and Dr Wouter Basson.

proceedings, (b) that the scope of the PAIA request is unreasonably vague. (c) PAIA exemption provisions justify nondisclosure of the records.

[5] SAHA persists with the appeal in respect of the documents relevant to Mr. Blaauw, Mr. Palazzolo, and Mr. Hill.

The parties

[6] SAHA is a non-profit, non-governmental organization which seeks to archive and preserve records evidencing past and contemporary struggles for justice. It seeks to ensure public access to historical records relating to struggles for justice and to prevent the loss of such records.

[7] SAHA has requested the records after consulting with a group of South African researchers who are in the process of collecting and analyzing apartheid era archival material for a book that will focus on procurement practices and public accountability during apartheid. The book is to be distributed for commercial gain.

[8] The SARB is the central SARB of the Republic of South Africa. The primary objective of the SARB is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic. Its function is not to prosecute perpetrators involved in economic crimes but would only undertake investigations into economic crimes such as fraud, gold smuggling or smuggling, where such conduct involves the alleged non-compliance with the laws supervised and administered by the SARB.

Non-Joinder

[9] The SARB asserts that since this application may affect the interest of Mr. Blaauw, Mr. Hill, and Mr. Palazzolo, they should have been cited as parties to the application. The SARB also raised *in limine* the point of non-joinder in its answering affidavit.

[10] SAHA asserts that rule 3(5)(a) notice process provided for in the PAIA Rules³ replaced the joinder process contemplated in Rule 10 of the Uniform Rules of Court and “that joinder of necessity” (as opposed to joinder of convenience) does not require Messrs Palazzolo and Hill to be joined in the proceedings.

[11] In terms of rule 3(5)(a) of the PAIA rules, the public bodies served with an application in terms of section 78 of PAIA is required to “notify, in writing, all other persons affected, of the application” and to attach a copy of the application to such notice.

[12] The purpose of Rule 3(5)(a) is to make affected persons aware of the institution of the PAIA proceedings. Rule 2(2) read with rule 3(5)(a) does not make provision for third parties to whom the records relate to being called on notice of motion to indicate whether they oppose the proceedings and if so, to be allowed filing answering papers. Such third parties may not be aware that they have a right to participate in the proceedings actively and will be deprived the right to be heard before their personal information is disclosed.

[13] Rule 3(5)(a) does not affect the common law rule relating to obligatory joinder of parties. The test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court.⁴ This has been found to mean that if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests’ of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined⁵.

[14] The failure to join a necessary party may also be cured if an informal notice is asking such a party whether it wished to intervene met by an unequivocal response that it will abide by the decision of the court⁶. Mr. Palazzolo was notified in writing

³ Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act, 2 of 2000, published in GN R965 in GG 32622 of 9 October 2009

⁴ Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015)

⁵ Gordon v Department of Health: Kwazulu-Natal (337/07) [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA); 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA) (17 September 2008) para 9

⁶ In RE BOE Trust Ltd and Others NNO 2013 (3) SA 236 (SCA) at para 19

that he is an affected party contemplated in the PAIA rules and was provided with a copy of the application. The notice of motion does not ask for documents about him to be disclosed, and he never indicated that he would abide by the decision of the court.

[15] Mr. Hill was also notified of the application but was never invited to participate in the proceedings despite having a direct and substantial interest in any order that the court might make. His notification does not meet the test for joinder. As Brig Blaauw is deceased, it was not necessary to join his heirs.

[16] The records sought concerns information relating to financial transactions in which each of the listed persons may have been involved. Additionally, the allegations made in the description of the PAIA request presuppose that the listed persons may have been involved in activities implicating them in serious and substantial contraventions of the law and fraud. They thus have a substantial interest, and they should have been joined.

[17] The records to which SAHA seeks access concerns information relating to the financial transactions in which these individuals have been involved. The records requested constitute "personal information"⁷ which is protected from disclosure in terms of section 34⁸ of PAIA.

[18] I agree with SARB submission that SAHA is non-suited to proceed with this application in the absence of a proper joinder of the listed persons. Even if I am wrong in my conclusion, the appeal falls to be dismissed on the ground that the scope of the PAIA request is unreasonably vague.

SARB's interpretation of the applicant's PAIA request

⁷ (b) information relating to the education or the medical, criminal or employment 45 SAHA of the individual or information relating to financial transactions in which the individual has been involved; Para (b) of the definition of "Personal information" in section 1 of PAIA

⁸ 34. (1) Subject to subsection (2), the information officer of a public body must refuse

a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.

[19] The request sought access to:

“Copies of any and all records, or parts of records, of any evidence obtained by the SARB at any time as part of investigations into any substantial contraventions of, or failure to comply with the law in terms of significant fraud (including fraud through the manipulation of the financial rand dual currency, foreign exchange or forging Eskom bonds), gold smuggling or smuggling of other precious metals from 1 January 1980 to 1 January 1995 in relation to the following persons” (own underlining)

[20] The request, as formulated is unduly vague and broad. It does not identify the specific records being sought as contemplated in Rule 18 which requires the description given to afford a reasonable official with “sufficient particulars” to identify the record or records requested. Instead, the SARB is required subjectively to determine which records may tend to prove a substantial contravention amounting to significant fraud. It is also not clear whether the records sought in the request refer to records obtained by the SARB at any time or whether the records are limited to the period of 1 September 1985 to March 1995.

[21] In **Afriforum NPC v Deputy Information Officer of the Presidency**⁹, it was pointed out that:

“the logical point of departure in every application to compel disclosure of a record would indeed be: what was asked for? PAIA itself leaves no doubt that what may be requested is a 'record.' A record is defined in section 1 as 'any recorded information.' Plainly, PAIA does not facilitate an open interrogation about 'information' more broadly. For example, 'information' about a practice or a course of conduct is not the species of information capable of being requested in terms of PAIA if it is not 'recorded information.' PAIA is not an omnibus device to achieve public accountability from organs of state; it is one of several instruments to do so, in different ways, and PAIA ought not to be construed in a manner to make it perform a role for which it was not designed.”

[22] The SARB raised a concern with SAHA in a letter dated 14 August 2014 that SAHA has lodged in total 14 requests for information in circumstances where it was not apparent why numerous requests were required to be lodged. SARB requested

⁹ Unreported judgment (7376/14) [2015] ZAGPPHC 933 (30 October 2015)

SAHA to provide it with reasons why and purposes SAHA seeks information referred to in the requests to be able to properly consider the request.

[23] In response, SAHA pointed out that in terms of section 11(3)¹⁰ of the Act its right of access is not affected by the reasons given for requesting access nor by the public body's belief as to what those reasons may be. SAHA stated that it is not required under the Act to provide reasons for the requests for information. SAHA stated further that the request falls within the public interest considering the subject matter and the reasons for which it is being sought.

[24] The SARB requested SAHA to provide sufficient particulars to enable SARB to identify the records which are sought in the request. The SARB was concerned that the excessively broad nature of the relevant request would cause the SARB to unreasonably and substantially divert its resources in order, among other things, to consider thousands of investigations and related documents, in order to ascertain whether or not the records, which the SARB has assumed are the records sought exists.

[25] SAHA, however, failed to provide the requested details. The SARB interpreted the PAIA request for "*any evidence obtained at any time as part of investigations pertaining to significant fraud*" including *fraud through manipulation of the financial rand dual currency, foreign exchange or forging of Eskom Bonds* to mean records obtained by the SARB through formal investigations recorded in the register of investigations conducted by its Financial Surveillance Department into significant fraud to the extent that the records relate specifically and directly to the listed persons.

[26] In its replying affidavit, the subject matter of the request was reformulated to "*all documents or other records forming part of the investigation files opened in relation to the alleged fraudulent and criminal activities of Mr. Palazzolo, Mr. Hill, and Brig. Blaauw*".

¹⁰ Section 11(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by-

(a) any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access.

[27] In its heads of argument, SAHA again revised the request to say the information sought concerned “*alleged serious violations and criminal conduct.*” This is not what SAHA asked for. SAHA did not ask for a record of alleged serious violations and criminal conduct. The court is not licensed to entertain the rolling request, and the application falls to be dismissed for this reason alone.

Reliance on new grounds of grounds on appeal

[28] In its answering affidavit, the SARB introduced additional grounds of refusal to those it relied on when it took a decision not to disclose the records requested in the PAIA request. SAHA asserts that it is not permissible for the SARB to rely on new grounds of refusal to bolster its refusal.

[29] The nature of the current proceedings is a statutory (wide) appeal, not a review. The Constitutional Court in **President of the Republic of South Africa v M & G Media Ltd**¹¹ stated that in proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits.

[30] It follows that SAHA is entitled to rely on new grounds of appeal and the SARB is entitled to rely on new grounds of refusal as the court of appeal is placed in exactly the same position as the original decision-maker and enjoy the power of rehearing *de novo*¹²

Exclusion grounds

[31] The SARB established that investigation files were open during the relevant time for Mr. Palazzolo, Brig Blaauw, and Mr. Hill and considered whether the

¹¹ 12012(2) SA 50 (CC) at para 14

¹² Tantoush v Refugee Appeal Board 2008 (1)SA 232 (T) at para 90

documents contained in the files potentially “reveal evidence” of significant fraud or smuggling.

[32] Mr. Palazzolo’s investigation file contained a copy of the Harms Commission Report, clips of newspaper articles, trust documents, Exchange Control index cards, proof of transactions by a family trust, copies of Mr. Palazzolo’s SARB statements, investigator notes and calculations. The file was closed and no attachment, blocking of funds also forfeiture steps were proceeded with against Mr. Palazzolo.

[33] The SARB concluded that none of these documents revealed or constituted “evidence” that Mr. Palazzo was involved in significant fraud or smuggling.

[34] The SARB did not give Mr. Palazzo a notice in terms of section 47 of Paia. It nevertheless relied on section 34. of PAIA as an exclusion ground for refusing access to documents relating to Mr. Palazzolo. Personal information as defined in section 1 of PAIA, includes, among other things, information relating to financial transactions in which the individual in question has been involved. The document in Mr. Palazzo’s investigation file constitute personal information as defined and are protected from disclosure in terms of section 34(1) of PAIA.

[35] The investigation file for Brig Blaauw contained a letter from the Exchange Control Department addressed to the Commissioner of South African police service recording that Brig Blaauw was allegedly involved in the contravention of the Exchange Control Regulations, annual financial statements, audited and accounting records, share registers, company registration documents and minute books of the company in which Brig Blaauw was a director, newspaper clippings, deed of transfer of property, vehicle registration documents, income returns and assessments and some accounting notes relating to the company.

[36] The SARB also concluded that none of the documents in brig Blaauw investigation file revealed or constituted “evidence” that Bri Blaauw was involved in significant fraud or smuggling.

[37] The SARB relies on the provisions of section 36 PAIA as an exemption in respect of the provision of documents contained in the investigation file compiled for Brig Blaauw, relating to the company in which Brig Blaauw was a director.

[38] In terms of section 36(1)(b) of PAIA an information office of the public body must refuse a request for access to a record if it contains financial, commercial, scientific or technical information, other than trade secrets, of the third party, the disclosure of which would likely to cause harm to the commercial or financial interest of that third party.

[39] The investigation file of Mr. Hill consists of forty-three archive boxes, which were not indexed or sorted. Thirty of the boxes contain files compiled by forensic auditors. The SARB concluded that the documents could potentially reveal or constitute evidence that Mr. Hill was involved in significant fraud.

[40] The SARB relies on section 45 of PAIA is an exclusion ground in relation to the 43 archive boxes full of documents relating to Mr. Hill. Section 45 (1) (b) of PAIA provides that an information officer may refuse a request for access to a record if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

[41] The SARB explains that to analyze 43 archive boxes on an average of 2 to 3 days per box is likely to take up approximately 86 to 129 days. It asserts that the unreasonable to expect the SARB to divert specialized resources to carry out this exercise.

[42] The SARB is further concerned about the vast number of third parties that may be affected by the disclosure of the information, and whether it would be feasible to notify the relevant third parties of the PAIA request in terms of section 47 of PAIA. The SARB taking a random sample of 10 files from the archive boxes estimates that there are at least 148 third parties referred to in the documents considered.

[43] The processing of the PAIA request pertaining to Mr. Hill will clearly unreasonably divert the SARB's resources.

Public interest override

[44] SAHA asserts that the public interest in disclosure of the documents outweighs the harm contemplated in any of the exemptions grounds relied upon by the SARB to refuse the PAIA request. SAHA argue that the records must be disclosed under section 46 of PAIA.

[45] Section 46 of PAIA provides that an information officer of a public body must grant a request for access to a record, despite the fact that it falls within the ambit of one of the exemption if:

- (a) The disclosure of the court would reveal evidence of a substantial contravention of, or failure to comply with the law; and
- (b) the public interest in the disclosure of the record outweighs the harm contemplated in the provision in question.

[46] The requester must show on the balance of probabilities that the disclosure would reveal evidence of the substantial contravention of the law or failure to comply with the law. The SARB submits that there is no evidence that the records contained in the investigation file of Mr. Palazzo and Brig Blaauw would reveal evidence of a contravention of the law as contemplated in section 46.

[47] SAHA's allegations against Mr. Palazzolo paragraph 121 of its founding affidavit is that:

"It has been alleged in the media that Palazzolo found such an easy welcome in both Ciskei and South Africa because of the Ciskei's importance as an intermediary in the movement of covert funds from South Africa, possibly especially in order to finance arms and nuclear programmes in secret collaboration with Israel. According to the media reports Palazzolo through Papillon International (a company he and De Pontes set up) was to use his contacts, capital and expertise with illicit flows to help set up the Bank of Bisho for this purpose, as well as facilitate request, the *Sunday Times* reported that Palazzolo was described in an

internal Reserve Bank document of the time as a "highly exceptional case", and that unnamed senior authorities had intervened to authorise the bending of exchange control rules in order to allow R14,5 million in Financial Rands to be released to him (the standard limit for immigrants was R100, 000)."

[48] The SARB has confirmed in its answering affidavit that Mr. Ellis reported that he could not find any trace of the alleged " internal Reserve SARB document" referred to in the Sunday Times article. On the application of the test in *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* regarding the resolution of factual disputes, the court is required to accept that the document could not be found.

[49] SAHA's allegation against Brig Blaauw is that he was present at the meeting in 1976 when Botha (then a senior cabinet member) concluded a deal with the Israeli government to provide the government with 500 tons of uranium (yellowcake) in return for 30 g of tritium, a radioactive substance that thermonuclear weapons required to increase the explosive their power. SAHA does not allege that Brig Blaauw was involved in a contravention of the exchange control laws in any way.

[50] With regard to Mr. Hill, the SARB concedes that it is possible that the 43 archive boxes could reveal evidence of a substantial contravention of the law.

[51] SAHA contends that the SARB misapplies the tests in section 46 by weighing a range of factors that, in its opinion, favour or do not favour the disclosure of information. SAHA is said that the SARB is required to consider the public interest in disclosure, and then weigh this against any harm that may arise. It submits that the "harm" be limited to the harm which the exclusionary sections seek to avoid, not other factors which in the opinion of the public body may favour or not favour disclosure.

[52] The SARB relies on two public interest exclusion grounds, namely the possible abuse of information gathering powers (protected by section 42(1) of PAIA and the prejudice to the future supply of information to the SARB (protected under section 37(1)(b) and 42(1) of PAIA.

[53] For its reliance on section 45 of PAIA (unreasonable diversion of resources), the SARB explained how the processing of the documents would be cumbersome.

[54] In my view, the SARB cannot be faulted for considering other factors relevant to establishing the public interest in the disclosure of information. The SARB was of the view that SAHA seeks disclosure of investigation files for purposes of documenting SAHA in a book which is not a pressing issue. The SARB also took into account that SAHA was not seeking a report or memorandum, but whose documents which may, out of context, result in the speculative and unsubstantiated commentary.

[55] In my view, the public interest in the disclosure of the record does not outweigh the harm contemplated in the exclusion ground especially given the fact that the PAIA request pertains to documents collected by the SARB decades ago.

Severability

[56] Section 28(1) of PAIA deals with severability and provides that

(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which-

(a) does not contain; and

(b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.


[57] SAHA contends that SARB has made it impossible to consider every part of every record to determine whether it can be disclosed by putting up a generic and blanket refusals based on a blanket justification.

[58] The various exclusion grounds relied upon by the SARB relate to respective categories of documents, as identified. This does not justify a conclusion that the SARB relied on blanket assertions as it is clear which type of documents are contained in the investigation files analyzed by the SARB. The SARB has shown that the documents cannot be found therefore the issue of severability cannot apply.

[59] I find that the SARB has complied with its duties under section 28 of the PAIA.

[60] In the result, I make the following order;

1. The application is dismissed with costs, inclusive of the costs of two counsel.



K E MATOJANE
JUDGE OF THE HIGH COURT

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| COUNSEL FOR THE APPLICANT: | Adv G Budlender SC appearing with Adv N Rajab-Budlender & Adv F. Hobden |
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| RESPONDENT'S ATTORNEYS: | Werkmans |
| DATE OF HEARING: | 04 August 2017 |
| DATE OF JUDGMENT: | 19 March 2018 |